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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

SEAMPRUFE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Seamprufe, Inc., Petitioner herein, prays that a writ of certiorari be issued to the United States Court of Appeals for the Tenth Circuit to review the decree of that court entered on February 19, 1951, enforcing an order of the National Labor Relations Board (hereinafter called the "Board") dated April 8, 1949, under Section 10 of the National Labor Relations Act as amended.

Opinions Below

The findings of fact, conclusions of law and order of the Board are recorded at 82 N. L. R. B. 892 (1949) (R. 60-70). The opinion of the Court of Appeals is not as yet reported.

Jurisdiction

The decision of the Court of Appeals was filed on January 2, 1951, and its decree was entered on February 19, 1951. Thereafter, on March 9, 1951, Seamprufe filed a petition for rehearing. On March 19, 1951, an order was entered by the Court of Appeals denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947.

Questions Presented

1. Whether the prosecution of the Board's case against a Union and an agent of a Union, and the Board's case against Petitioner by the same attorney in the same proceeding was contrary to due process.

2. Whether the Court of Appeals erred in failing to apply the broadened scope of court review, provided for in the 1947 amendments to the National Labor Relations Act, when it reviewed said findings and order.

3. Whether the Board's order is supported by substantial evidence on the record considered as a whole.

Statutes Involved

The pertinent provisions of the National Labor Relations Act and its amendments and of the Administrative Procedure Act are set forth *infra* in the appendix.

Statement

In January, 1948, Seamprufe filed its charge against the International Ladies Garment Workers Union and Mavis Lane, representative of the Union (R. 12, 14). Likewise,

in January, 1948, Mavis Lane and the International Ladies Garment Workers Union filed an amended charge against Seamprufe complaining of the discharge of two of Seamprufe's employees, Virginia Romeo Webb and Edna Clendenon, and other alleged unfair labor practices. As set forth *supra,* complaints were issued on each of the charges. The complaints were consolidated and one Board attorney was designated to prosecute each of the cases in the consolidated proceeding.

After issuance of its order against Seamprufe, the Board, on April 17, 1950, petitioned the Court of Appeals for the Tenth Circuit for enforcement. On January 2, 1951, the Court's opinion enforcing the Board's order against the petitioner was filed. The decree enforcing the Board's order was entered on February 19, 1951.

Specification of Errors To Be Urged

The Court erred:

1. In holding that the prosecution of the charges against the Union and Lane and against Seamprufe by the manner in which the hearing was conducted was not a denial of due process.

2. In not applying the broadened scope of court review of Board findings and orders as provided for in the 1947 amendments to the National Labor Relations Act.

3. In enforcing the Board's order.

Reasons for Granting the Writ

The basic question decided by the Court below and presented in the instant petition is an important issue of federal law which has not been, but should be, settled by this Court. Also, the Court of Appeals has failed to adhere to the rule of law regarding review as provided for in the 1947 amendments to the National Labor Relations Act and

the Administrative Procedure Act, and its decision in this case is not in accord with applicable decisions of this Court.

1. At the hearing of the consolidated cases before the Board's Trial Examiner, Mr. Wilson, an attorney appearing on behalf of the Board, prosecuted both the case against the Union and Mavis Lane and the case against Seamprufe.

This unique procedure was not pursuant to any rules or regulations of the Board. In fact, the Board's rules and regulations make no provision for prosecution of cases by a *single* Board attorney where complaints against an employer and a Union are consolidated.

At the hearing Mr. Wilson presented the case against the Union and Mavis Lane after having consulted with Seamprufe's witnesses regarding Seamprufe's charge against the Union and Mavis Lane. When Mr. Wilson began to present the case against Seamprufe in the very same hearing, counsel for Seamprufe vigorously objected to this anomalous procedure, but the objection was overruled (R. 137).

In the course of the hearing Mr. Wilson had to switch, in chameleon-like fashion, from opposition to the Union to opposition against the employer. The full-scale travesty of judicial and quasi-judicial proceedings was so flagrant that at one point in the hearing the attorney for the employer noted that it was difficult "to keep up with Mr. Wilson, whether he is on one side or on the other" and it was not known whether Mr. Wilson was arguing in his behalf or against him (R. 230).

The fantastic procedure resulting from Mr. Wilson's conduct cannot be given the imprimatur of regularity or due process. It violated every sense of decency. The hearing, at times, became farcial. It was an indignity to judicial due process and a blot on the record of an administrative board dedicated to adherence to the principles of proper standards and justice.

A substantial regard for judicial or quasi-judicial standards by administrative boards has been cogently empha-

sized by Chief Justice Hughes in *Morgan* v. *United States*, 304 U. S. 1, 14, 15 (1937), where he said:

> "• • • in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard' (citing cases)."

In *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73 (1935), Justice Brandeis wrote:

> "The inexorable safeguard which the due process clause assured is • • • that the procedure at the hearing shall be consistent with the essentials of a fair trial."

In reality, Mr. Wilson was advocate for the Union and Mavis Lane, on the one hand, and advocate for the Employer on the other hand.

In *United States* v. *Carter*, 217 U. S. 286, 306 (1909), this Court restated the general rule prohibiting a fiduciary from serving two masters, as follows:

> "And it is a rule of universal application, that no one having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict with the interest of those he is bound to protect.
>
> "So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."

A fortiori does this rule apply to attorneys at law as well as to fiduciaries.

This well-settled rule, enunciated by *United States* v. *Carter, supra,* has been formulated by the various states

in their Professional Codes of Ethics for attorneys.* The rationale of the rule is the protection of clients with adverse interests against a practice which would deprive them of their basic rights to be represented by attorneys who will not be serving two masters, making impossible the maintenance of the essential confidential relationship between attorney and client.

The orderly requirements of due process demand that in a case like the one at bar, where cross-charges of a Union against an Employer and an Employer against a Union are consolidated, a *separate* Board attorney should be designated to prosecute each of the charges in the consolidated cases.

2. Before the Court of Appeals, Seamprufe contended that the Board's order should be vacated because the Board's findings are not supported either by substantial evidence on the record considered as a whole or by a preponderance of testimony.

Seamprufe argued that the Taft-Hartley Act, by amendments of the National Labor Relations Act in 1947, broadened the power of a court's review of a Board order. Seamprufe referred to Section 10(c) of the amended Act which provides that the Board's findings shall be based upon the "preponderance of the testimony". Also reference was made to Sections 10(e) and (f) of the amended Act, which provide that the findings shall be "supported by substantial evidence on the record considered as a whole". The Circuit Court's attention was invited to this Court's decision in the case of *Pittsburgh Steamship Company* v. *National Labor Relations Board,* 337 U. S. 656.

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* E.g.: "It is unprofessional to represent conflicting interests, except by express consent of all concerned, given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in the behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose" (Canon No. 6, Canons of Professional Ethics by the Association of the Bar of the City of New York).

Counsel for the Board argued that there was ample basis in the record to sustain the Board's findings and cited cases from the Tenth Circuit Court.

The Court of Appeals concluded that the findings of the Board were supported by substantial evidence. The Court, apparently, applied the limited scope of review that it had applied to cases arising under the National Labor Relations Act before it was amended in 1947. This conclusion is borne out by the case of *Labor Board* v. *Continental Oil Company*, 169 F. 2d 552 (1950), where the Court of Appeals held that no change in the court's scope of review had been made by the Taft-Hartley amendments to the National Labor Relations Act.

In that case the Court of Appeals at page 555 discussed the rule of the scope of review applied by that court as follows:

> "Respondent argues that the change in congressional attitude on labor matters as evidenced by the Taft-Hartley Act should be recognized. It is pointed out that the scope of judicial review of the board's decisions had been enlarged. Section 10(b) of the National Labor Relations Act provided: 'The rules of evidence prevailing in courts of law and of equity shall not be controlling.' In the amendment this provision was written to read: 'Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States, * * *' Section 10(e) of the old Act stated: 'The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' This last provision was changed by the 1947 amendment to read: 'The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.' Other than these changes, the law relating to enforcement and review remains the same.
>
> "By these changes Congress may have intended to broaden the scope of judicial review and confer power upon the courts to review the board's findings of fact as well as conclusions of law. If it had such an intent, it failed in the result. The amendments limit the

review to a determination as to whether or not, considering the record as a whole, there is substantial evidence to sustain the finding. *So far as the review is concerned, this leaves us in the same status as before the amendments.* The courts then required the finding to be supported by substantial evidence. *Packard Motor Car Co.* v. *N. L. R. B.*, 330 U. S. 485; 491. In *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229, the court said: 'We agree that the statute, in providing "that the findings of the board as to the facts, if supported by evidence, shall be conclusive," means supported by substantial evidence'. The scope of review by the courts since the amendments is carefully discussed by Chief Judge Parker speaking for the Court of Appeals of the Fourth Circuit in *Eastern Coal Corp.* v. *N. L. R. B.*" (Italics ours.)

Thus it is clear that the Circuit Court applied the limited rule of review in the instant case as it had in cases which it reviewed prior to the amendment of the National Labor Relations Act.

This is in direct conflict with a recent decision of this Court in the case of *Universal Camera Corporation* v. *National Labor Relations Board*, ... Sup. Ct., ... (Feb. 26, 1951). In that case this Court held that the scope of court review had been broadened by the amendment of the National Labor Relations Act. Justice Frankfurter declared:

> "The essential issue raised by this case and its companion, *Labor Board* v. *Pittsburgh Steamship Co.*, p. , infra, is the effect of the Administrative Procedure Act and the legislation colloquially known as the Taft-Hartley Act on the duty of Courts of Appeals when called upon to review orders of the National Labor Relations Board. • • •
>
> "Even though the whole record may have been canvassed in order to determine whether the evidentiary foundation of a determination by the Board was 'substantial', the phrasing of this Court's process of review readily lent itself to the notion that it was enough that the evidence supporting the Board's result was 'substantial' when considered by itself. It is fair to say that by imperceptible steps regard for the fact

finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings. * * *

"From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof to which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof. * * *

"The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is the clear meaning of the reference in both statutes to 'the whole record'. * * *

"Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. * * *

"The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized. Of course it is a statute and not a committee report which we are interpreting. But the fair interpretation of a statute is often 'the art of proliferating a purpose', *Brooklyn National Corp.* v. *Commissioner,* 157 F. 2d 450, 451, revealed more by the demonstrable forces that produced it than by its precise phrasing. The adoption in these statutes of the judicially-constructed 'substantial evidence' test was a response to pressures for stricter and more uniform practice, not a reflection of approval of all existing practices. To find the change so elusive that it cannot be precisely defined does not mean it may be ignored. We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

Thus it is clear from the decision in the *Universal Camera* case that the scope of review applied in the instant case was limited and failed to conform with the provisions of the amended National Labor Relations Act and the Administrative Procedure Act.

3. The Court below improperly enforced the Board's order since it is not supported by substantial evidence on the record considered as a whole, as required by the amended Act. An examination of the record reveals that the Board ignored the evidence given by Seamprufe and gave credence only to the testimony given by Union witnesses.

The record discloses that there is neither substantial evidence on the record considered as a whole or a preponderance of testimony that Clendenon was discharged because of Union membership or activity; that the plant manager, Baum, knew that Clendenon was a member or active in the Union (R. 197, 198); that Sullivan, Clendenon's supervisor, who was the one who discharged Clendenon,

knew that Clendenon was active or a member of the Union. and that Clendenon was not discharged because her work was unsatisfactory (R. 232, 233, 238).

The record further reveals that the discharge of Webb was not an unfair labor practice because there was neither substantial evidence on the record considered as a whole or a preponderance of testimony that Baum, the plant manager, knew that Webb was a member of the Union.

Furthermore, there was no substantial evidence on the record considered as a whole or a preponderance of testimony that Seamprufe violated Sections 8(a)(1) or 8(a)(2) of the Act.

It is submitted that the decree of the Court below enforcing the Board's order is contrary to the provisions of the amended Act and, because the hearing was contrary to due process, there is presented an important issue of federal law, which has not been but should be resolved by this Court.

CONCLUSION

Because of the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

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April 1951